

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH B. GIBBS,

No. C-13-2114 TEH (PR)

Plaintiff,

ORDER SERVING COGNIZABLE CLAIMS

v.

(Doc. # 4)

T. FARLEY, et al.,

Defendants.

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Plaintiff Kenneth Gibbs, an inmate at Pelican Bay State Prison (PBSP) in Crescent City, California, commenced this action on May 8, 2013 by submitting a letter to the Court. Subsequently, Plaintiff properly filed a complaint on the Court's civil rights form. Doc. #4. Plaintiff also has filed an application to proceed in forma pauperis (IFP). This application is granted in a separate order. Plaintiff's complaint is now before the Court for initial screening pursuant to 28 U.S.C. § 1915A.

I

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be

1 granted," or "seeks monetary relief from a defendant who is immune  
2 from such relief." Id. § 1915A(b). Pleadings filed by pro se  
3 litigants, however, must be liberally construed. Hebbe v. Pliler,  
4 627 F.3d 338, 342 (9th Cir. 2010); Balistreri v. Pacifica Police  
5 Dep't., 901 F.2d 696, 699 (9th Cir. 1990).

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
7 allege two essential elements: (1) that a right secured by the  
8 Constitution or laws of the United States was violated, and (2) that  
9 the alleged violation was committed by a person acting under the  
10 color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

11 Liability may be imposed on an individual defendant under  
12 § 1983 if the plaintiff can show that the defendant proximately  
13 caused the deprivation of a federally protected right. Leer v.  
14 Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of  
15 Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives  
16 another of a constitutional right within the meaning of § 1983 if he  
17 does an affirmative act, participates in another's affirmative act  
18 or omits to perform an act which he is legally required to do, that  
19 causes the deprivation of which the plaintiff complains. Leer, 844  
20 F.2d at 633.

## 21 II

22 In his complaint, Plaintiff asserts the following  
23 allegations. On April 24, 2013, PBSP Officers T. Farley and R.  
24 Grahams came to Plaintiff's cell to escort him to the  
25 Interdisciplinary Treatment Team (IDTT). Officer J. Andersen was  
26 also present. Officers Farley and Andersen handled Plaintiff  
27 aggressively, making him feel that his welfare and security was at  
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1 stake. Upon exiting the building and out of sight of other inmates,  
2 these Officers slammed Plaintiff against the wall and told him that  
3 "if he moved, they were going to take him down." The Officers then  
4 reversed directions and began escorting Plaintiff back to his cell.  
5 Within a few feet of his cell, someone placed their foot before  
6 Plaintiff, causing him to fall. While Plaintiff was falling,  
7 Officer Andersen placed his knee upon Plaintiff's back, causing  
8 Plaintiff's handcuffs to tighten so that he felt excruciating pain.  
9 While Plaintiff was on the ground, Officers Andersen and Farley  
10 jammed their elbows into Plaintiff's neck, causing him more pain.  
11 During this entire time, Plaintiff was not resisting the Officers.  
12 Other Officers arrived at the scene. Officer Chisman kicked  
13 Plaintiff in his loins.

14 As a result of the Officers' use of excessive force,  
15 Plaintiff suffered a swollen eye, a swollen knee and a sprained  
16 wrist. The Officers also filed a Rules Violation Report (RVR)  
17 against Plaintiff, falsely asserting that he was resisting a peace  
18 officer. Plaintiff was found guilty and lost ninety days of good  
19 time credit.

20 Based on these allegations, Plaintiff alleges the  
21 following claims: (1) an Eighth Amendment claim against Officers  
22 Farley, Andersen, Chisman based on their use of excessive force  
23 against Plaintiff; (2) an Eighth Amendment claim against Officer  
24 Grahams based on the fact that she was present when the other  
25 Officers violated Plaintiff's Eighth Amendment rights and did  
26 nothing to stop them; and (3) a claim for lack of access to the  
27 Courts against Officers Farley and Andersen on the ground that they  
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1 filed false reports of the above-mentioned incident to cover up  
2 their use of excessive force.

3 III

4 A

5 In its prohibition of "cruel and unusual punishment," the  
6 Eighth Amendment places restraints on prison officials, who may not,  
7 for example, use excessive force against prisoners. Hudson v.  
8 McMillian, 503 U.S. 1, 6-7 (1992). Where a prisoner claims that  
9 prison officials used excessive force, he must show that the  
10 officials applied force maliciously and sadistically to cause harm.  
11 Id.; Furnace v. Sullivan, 705 F.3d 1021, 1030 (9th Cir. 2013).  
12 Although the Eighth Amendment protects against cruel and unusual  
13 punishment, this does not mean that federal courts can or should  
14 interfere whenever prisoners are inconvenienced or suffer de minimis  
15 injuries. Hudson, 503 U.S. at 9-10. In determining whether the use  
16 of force was for the purpose of maintaining or restoring discipline,  
17 or for the malicious and sadistic purpose of causing harm, a court  
18 may evaluate the need for application of force, the relationship  
19 between that need and the amount of force used, the extent of any  
20 injury inflicted, the threat reasonably perceived by the responsible  
21 officials, and any efforts made to temper the severity of a forceful  
22 response. Id., 503 U.S. at 7; LeMaire v. Maass, 12 F.3d 1444, 1454  
23 (9th Cir. 1993); see also Spain v. Procunier, 600 F.2d 189, 195 (9th  
24 Cir. 1979) (guards may use force only in proportion to need in each  
25 situation).

26 Construing these allegations liberally, Plaintiff states  
27 an Eighth Amendment excessive force claim against Defendants.

B

Prisoners have a constitutional right of access to the courts. Lewis v. Casey, 518 U.S. 343, 350 (1996); Bounds v. Smith, 430 U.S. 817, 821 (1977).<sup>1</sup> To establish a claim for a violation of the right of access to the courts, the prisoner must prove that there was an inadequacy in the prison's legal access program that caused him an actual injury. Lewis, 518 U.S. at 350-55. To prove an actual injury, the prisoner must show that the inadequacy in the prison's program hindered his efforts to pursue a non-frivolous claim in court concerning his conviction or conditions of confinement. Id. at 354-55; Christopher v. Harbury, 536 U.S. 403, 415 (2002) (to state a claim, allegations must show the actual injury of being shut out of court). Plaintiff is also informed there is no constitutional right to a prison administrative appeal or grievance system. Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). Furthermore, a prisoner has no constitutionally guaranteed right not to be falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest. Sprouse v. Babcock, 870 F.2d 450, 452 (8th Cir. 1989); Freeman v. Rideout, 808 F.2d 949,

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<sup>1</sup> The constitutional source of the right of access to the courts is not settled. See Christopher v. Harbury, 536 U.S. 403, 413-14 & 415 n.12 (2002); Lewis, 518 U.S. at 366-67 (Thomas, J., concurring). Supreme Court decisions have grounded the right in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. Christopher, 536 U.S. at 415 n.12 (citing cases). The Ninth Circuit also has found various constitutional sources for the right. See, e.g., Cornett v. Donovan, 51 F.3d 894, 897 (9th Cir. 1995) (right grounded in due process and equal protection clauses).

1 951 (2d Cir. 1986).

2 Even construed liberally, Plaintiff's allegations are  
3 insufficient to state a claim for lack of access to the courts.  
4 Plaintiff must allege that the actions of Defendants hindered him  
5 from pursuing his claims in court. Although Plaintiff states that  
6 Defendants' falsified their reports so that he was found guilty, he  
7 does not allege how those false reports prevented him from pursuing  
8 his claim against them in court. Furthermore, as stated above,  
9 Plaintiff has no constitutionally guaranteed right not to be falsely  
10 or wrongly accused of conduct which may result in the deprivation of  
11 a protected liberty interest. Sprouse, 870 F.2d at 452; Freeman,  
12 808 F.2d at 951.

13 Therefore, this claim against Defendants Farley and  
14 Andersen is dismissed. Dismissal is with leave to amend for  
15 Plaintiff to remedy the deficiency noted above, if he truthfully can  
16 do so.

17 IV

18 For the foregoing reasons, the Court hereby orders as  
19 follows:

20 1. Plaintiff's Eighth Amendment excessive force claims  
21 against all Defendants are cognizable. The Clerk shall issue  
22 summons and the United States Marshal shall serve, without  
23 prepayment of fees, copies of the complaint in this matter and all  
24 attachments thereto and copies of this order on the following PBSP  
25 employees: Officers Farley, Andersen, Grahams and Chisman. The  
26 Clerk shall also mail a copy of this order to Plaintiff and mail a  
27 courtesy copy of this Order and the complaint to the California  
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1 Attorney General's Office in San Francisco.

2           2. Plaintiff's claim based on lack of access to the court  
3 is dismissed with leave to amend for Plaintiff to remedy the  
4 deficiencies noted in the Order, if he truthfully can do so.

5           3. To expedite the resolution of this case, the Court  
6 orders as follows:

7           a. No later than sixty-three (63) days from the  
8 date of this order, Defendants shall file a motion for summary  
9 judgment or other dispositive motion. A motion for summary judgment  
10 shall be supported by adequate factual documentation and shall  
11 conform in all respects to Federal Rule of Civil Procedure 56, and  
12 shall include as exhibits all records and incident reports stemming  
13 from the events at issue. Defendants' motion shall include the  
14 required Ninth Circuit notice to Plaintiff for opposing dispositive  
15 motions required by Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir.  
16 1998)(motion for summary judgment) and Wyatt v. Terhune, 315 F.3d  
17 1108, 1120 n.14 (9th Cir. 2003) (motion to dismiss). See Woods v.  
18 Carey, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirements set  
19 out in Rand must be served concurrently with the motion); Stratton  
20 v. Terhune, 697 F.3d 1004, 1008 (9th Cir. 2012) (notice requirement  
21 set out in Wyatt must be served concurrently with motion to dismiss  
22 for failure to exhaust available administrative remedies). If  
23 Defendants are of the opinion that this case cannot be resolved by  
24 summary judgment or other dispositive motion, they shall so inform  
25 the Court prior to the date their motion is due. All papers filed  
26 with the Court shall be served promptly on Plaintiff.

27           b. Plaintiff's opposition to the dispositive motion  
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1 shall be filed with the Court and served upon Defendants no later  
2 than thirty-five (35) days after Defendants serve Plaintiff with the  
3 motion.

4 c. Plaintiff is advised that a motion for summary  
5 judgment under Rule 56 of the Federal Rules of Civil Procedure will,  
6 if granted, end your case. Rule 56 tells you what you must do in  
7 order to oppose a motion for summary judgment. Generally, summary  
8 judgment must be granted when there is no genuine issue of material  
9 fact - that is, if there is no real dispute about any fact that  
10 would affect the result of your case, the party who asked for  
11 summary judgment is entitled to judgment as a matter of law, which  
12 will end your case. When a party you are suing makes a motion for  
13 summary judgment that is properly supported by declarations (or  
14 other sworn testimony), you cannot simply rely on what your amended  
15 complaint says. Instead, you must set out specific facts in  
16 declarations, depositions, answers to interrogatories, or  
17 authenticated documents, as provided in Rule 56(c), that contradict  
18 the facts shown in Defendants' declarations and documents and show  
19 that there is a genuine issue of material fact for trial. If you do  
20 not submit your own evidence in opposition, summary judgment, if  
21 appropriate, may be entered against you. If summary judgment is  
22 granted, your case will be dismissed and there will be no trial.  
23 Rand, 154 F.3d at 962-63.

24 Plaintiff also is advised that a motion to dismiss for  
25 failure to exhaust administrative remedies under 42 U.S.C.  
26 § 1997e(a) will, if granted, end your case, albeit without  
27 prejudice. You must "develop a record" and present it in your  
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1 opposition in order to dispute any "factual record" presented by the  
2 Defendants in their motion to dismiss. Wyatt, 315 F.3d at 1120  
3 n.14. You have the right to present any evidence to show that you  
4 did exhaust your available administrative remedies before coming to  
5 federal court. Such evidence may include: (1) declarations, which  
6 are statements signed under penalty of perjury by you or others who  
7 have personal knowledge of relevant matters; (2) authenticated  
8 documents - documents accompanied by a declaration showing where  
9 they came from and why they are authentic, or other sworn papers  
10 such as answers to interrogatories or depositions; (3) statements in  
11 your complaint insofar as they were made under penalty of perjury  
12 and they show that you have personal knowledge of the matters stated  
13 therein. In considering a motion to dismiss for failure to exhaust,  
14 the Court can decide disputed issues of fact with regard to this  
15 portion of the case. Stratton, 697 F.3d at 1008-09.

16 (The Rand and Wyatt/Stratton notices above do not excuse  
17 Defendant's obligation to serve said notices again concurrently with  
18 motions to dismiss for failure to exhaust available administrative  
19 remedies and motions for summary judgment. Woods, 684 F.3d at 935.)

20 d. Defendants shall file a reply brief within  
21 fourteen (14) days of the date on which Plaintiff serves them with  
22 the opposition.

23 e. The motion shall be deemed submitted as of the  
24 date the reply brief is due. No hearing will be held on the motion  
25 unless the Court so orders at a later date.

26 3. Discovery may be taken in accordance with the Federal  
27 Rules of Civil Procedure. No further court order is required before  
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1 the parties may conduct discovery.

2           4. If Plaintiff can cure the pleading deficiencies  
3 described above in regard to his claim for lack of access to the  
4 court, he may file an AMENDED COMPLAINT within twenty-eight days  
5 from the date this order is filed. The amended complaint must  
6 include the caption and civil case number used in this order (C 13-  
7 2114 TEH (PR)) and the words AMENDED COMPLAINT on the first page.  
8 The amended complaint must indicate which specific, named  
9 Defendant(s) was involved in the cause of action, what each  
10 Defendant did, what effect this had on Plaintiff and how it hindered  
11 his efforts to file his claim in court. Plaintiff may not  
12 incorporate material from the prior complaint by reference. Failure  
13 to file an amended complaint within twenty-eight days and in  
14 accordance with this order will result in a finding that further  
15 leave to amend would be futile, and the deficient claim will be  
16 dismissed.

17           5. If Plaintiff does not wish to file an amended  
18 complaint, he shall so inform the Court within twenty-eight days  
19 from the date of this Order.

20           6. Plaintiff is advised that an amended complaint  
21 supersedes the original complaint. "[A] plaintiff waives all causes  
22 of action alleged in the original complaint which are not alleged in  
23 the amended complaint." London v. Coopers & Lybrand, 644 F.2d 811,  
24 814 (9th Cir. 1981).

25           7. All communications by Plaintiff with the Court must  
26 be served on Defendants, or Defendants' counsel once counsel has  
27 been designated, by mailing a true copy of the document to  
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1 Defendants or Defendants' counsel.

2           8. It is Plaintiff's responsibility to prosecute this  
3 case. Plaintiff must keep the Court and all parties informed of any  
4 change of address and must comply with the Court's orders in a  
5 timely fashion. Failure to do so may result in the dismissal of  
6 this action pursuant to Federal Rule of Civil Procedure 41(b).

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8 IT IS SO ORDERED.

9 DATED 06/25/2013



THELTON E. HENDERSON  
United States District Judge

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